

MICHELE L. MARYOTT, SBN 191993  
mmaryott@gibsondunn.com  
ASHLEY ALLYN, SBN 254559  
aallyn@gibsondunn.com  
GIBSON, DUNN & CRUTCHER LLP  
3161 Michelson Drive  
Irvine, CA 92612-4412  
Telephone: 949.451.3800 / Facsimile: 949.451.4220

JASON C. SCHWARTZ (*admitted pro hac vice*)  
jschwartz@gibsondunn.com  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036-5306  
Telephone: 202.955.8500 / Facsimile: 202.467.0539

Attorneys for Defendant  
SUNRISE SENIOR LIVING, LLC

[Additional Counsel Listed on Next Page]

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION – SANTA ANA

AUDREY HEREDIA, as successor-in-interest to the Estate of Carlos Heredia; AMY FEARN, as successor-in-interest to the Estate of Edith Zack; and HELEN GANZ, by and through her Guardian ad Litem, Elise Ganz; on their own behalves and on behalf of others similarly situated,

Plaintiffs,

v.

SUNRISE SENIOR LIVING, LLC; and  
DOES 1 through 100,

Defendants.

CASE NO. 8:18-cv-01974-JLS-JDE

[DISCOVERY DOCUMENT:  
REFERRED TO MAGISTRATE JUDGE  
JOHN D. EARLY]

**JOINT STIPULATION OF POINTS  
AND AUTHORITIES ON  
DEFENDANT SUNRISE SENIOR  
LIVING, LLC'S MOTION TO  
COMPEL FURTHER PRODUCTION  
OF DOCUMENTS**

**Hearing:**

Date: August 6, 2020  
Time: 10:00 a.m.  
Place: Courtroom 6A  
411 W. Fourth Street  
Santa Ana, CA 92701  
Judge: Hon. John D. Early

Discovery cut-off: March 26, 2021  
Pretrial Conference: July 30, 2021  
Trial: None Set

1 KATHRYN A. STEBNER, SBN 121088  
kathryn@stebnerassociates.com  
2 BRIAN S. UMPIERRE, SBN 236399  
brian@stebnerassociates.com  
3 STEBNER AND ASSOCIATES  
870 Market Street, Suite 1212  
4 San Francisco, CA 94102  
Telephone: 415.362.9800 / Facsimile: 415.362.9801

5 CHRISTOPHER J. HEALEY, SBN 105798  
chris.healey@dentons.com  
6 DENTONS US LLP  
4655 Executive Drive, Suite 700  
7 San Diego, CA 92121  
Telephone: 619.236.1414 / Facsimile: 619.232.8311

9 GUY B. WALLACE, SBN 176151  
gwallace@schneiderwallace.com  
10 MARK T. JOHNSON, SBN 76904  
mjohnson@schneiderwallace.com  
11 SCHNEIDER WALLACE COTTRELL  
KONECKY WOTKYNs LLP  
12 2000 Powell Street, Suite 1400  
Emeryville, CA 94608  
13 Telephone: 415.421.7100 / Facsimile: 415.421.7105

14 [Additional counsel listed on Signature Page]  
15 Attorneys for Plaintiffs and the Proposed Class

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
A. Sunrise’s Introduction .....	1
B. Plaintiffs’ Introduction .....	3
II. DEFENDANT’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS .....	5
A. Sunrise’s Argument.....	8
1. The Documents Are Indisputably Relevant and Critical to Sunrise’s Defense .....	9
2. Third-Party Documents and Communications Are Not Protected Work Product.....	10
3. Plaintiffs’ “Burden” Objection Is Meritless .....	13
B. Plaintiffs’ Argument.....	14
1. The Documents Sunrise Seeks Are Protected Work-Product .....	15
C. Sunrise’s Cases Are Inapposite.....	17
D. Sunrise Cannot Meet Its Burden Under Rule 23(b)(3) .....	20
E. Sunrise’s Smear of Plaintiffs’ Counsel is Baseless, False, and Irrelevant .....	21

# TABLE OF AUTHORITIES

Page(s)

## Cases

<i>Apple, Inc. v. Samsung Elecs. Co., Ltd.</i> , 306 F.R.D. 234 (N.D. Cal. 2015) .....	5, 11, 18
<i>Balfour Beatty Infrastructure, Inc. v. PB&amp;A, Inc.</i> , 2016 WL 7743032 (M.D. Fla. Nov. 30, 2016).....	14
<i>Bible v. Rio Properties, Inc.</i> , 246 F.R.D. 614 (C.D. Cal. 2007).....	13
<i>Bretana v. Int’l Collection Corp.</i> , 2008 WL 4334710 (N.D. Cal. Sept. 22, 2008).....	14
<i>Briggs v. OS Rest. Servs.</i> , Case No. 2:18-cv-8457 JAK, 2019 WL 7195620 (C.D. Cal. Sept. 10, 2019) .....	4, 5, 11, 17
<i>Brown v. Tax Ease Lien Serv., LLC</i> , 2017 WL 6939338 (W.D. Ky. Sept. 20, 2019).....	11, 12
<i>Burgess v. Tesoro Refining &amp; Marketing Co.</i> , Case No. CV 10-5870-VBF, 2011 WL 13217362 (C.D. Cal. Jul. 5, 2011) .....	20
<i>U.S. ex rel. Burroughs v. DeNardi Corp.</i> , 167 F.R.D. 680 (S.D. Cal. 1996) .....	16, 17
<i>In re Cal. Pub. Utils. Comm’n</i> , 892 F.2d 778 (9th Cir. 1989) .....	11
<i>Cal. v. Kinder Morgan Energy Partners, L.P.</i> , 2009 WL 10668706 (S.D. Cal. Sept. 28, 2009) .....	12
<i>Campbell v. Best Buy Stores, L.P.</i> , Case No. LA CV 12-07794 JAK, 2013 WL 5302217 (C.D. Cal. Sept. 20, 2013) .....	16, 19
<i>Coito v. Super. Ct.</i> , 54 Cal.4th 480 (2012) .....	15
<i>EEOC v. ABM Indus. Inc.</i> , 261 F.R.D. 503 (E.D. Cal. 2009).....	11, 18
<i>EEOC v. CRST Van Expedited, Inc.</i> , 2009 WL 136025 (N.D. Iowa Jan. 20, 2009) .....	12
<i>Fangman v. Genuine Title, LLC</i> , 2016 WL 3362538 (D. Md. June 17, 2016) .....	12

**TABLE OF AUTHORITIES**  
(continued)

	<u>Page(s)</u>
<i>Hawkins v. Kroger Co.</i> , Case No. 3:15-cv-02320-JM-AHG, 2020 WL 1952832 (S.D. Cal. Apr. 23, 2020) .....	15
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1946).....	12, 17
<i>Holmgren v. State Farm Mut. Ins. Co.</i> , 976 F.2d 573 (9th Cir 1992) .....	16
<i>Intel Corp. v. Via Technologies</i> , 204 F.R.D. 450 (N.D.Cal. 2001) .....	16, 18, 19
<i>Johnston v. Don Employees’ Pension Plan</i> , Case No. 14-cv-10427, 2016 WL 1106889 (E.D. Mich. Mar. 22, 2016) .....	19
<i>Loustalet v. Refco, Inc.</i> , 154 F.R.D. 243 (C.D. Cal. 1993).....	12
<i>O’Connor v. Boeing N. American, Inc.</i> , 216 F.R.D. 640 (C.D. Cal. 2003).....	16
<i>Rumac v. Bottomley</i> , 143 Cal.App.3d 810 (1983) .....	15, 19
<i>Sinohui v. CEC Entm’t, Inc.</i> , Case No. EDCV 14-2516-JLS, 2016 WL 2743458 (C.D. Cal. May 11, 2016) .....	4, 16, 20
<i>Yeager v. Bowlin</i> , 693 F.3d 1076 (9th Cir. 2012) .....	22
<b>Statutes</b>	
CCP §§ 2018.018 -2018.080.....	15
CCP § 2018.030 .....	19
CCP § 2018.030(a).....	15
CCP § 2018.030(b) .....	15
<b>Other Authorities</b>	
C. Wright & A. Miller, Fed. Practice & Proc. § 2024, at 201-02.....	11
<b>Rules</b>	
Fed. R. Civ. P. 26(b)(3) .....	4, 11, 15, 19, 20

1 **I. INTRODUCTION**

2 **A. Sunrise's Introduction**

3 Sunrise respectfully seeks this Court's intervention in obtaining two overlapping  
4 categories of documents that Plaintiffs are withholding: (1) documents that putative  
5 class members provided to Plaintiffs' counsel in the context of this litigation; and (2)  
6 correspondence between Plaintiffs' counsel and putative class members regarding this  
7 action. Plaintiffs' counsel concedes they have these documents in their possession,  
8 that the documents are relevant, and that they are organized and ready to be produced.  
9 However, they refuse to produce them on specious work product grounds and a  
10 frivolous "burden" argument. These objections have no merit.

11 Specifically, Sunrise has requested documents and communications: (1) relating  
12 to "claims, allegations, complaints and/or lawsuits by YOU in which YOU represented  
13 or sought to represent a class or classes of plaintiffs;" (2) relating to "any allegation in  
14 YOUR COMPLAINT" including those that plaintiffs contend "support" their  
15 allegations; and (3) provided to Plaintiffs in response to "subpoenas, public records  
16 requests, or informal requests" to third parties in connection with this action. Allyn  
17 Decl., Exs. A-C. After months of meet and confer efforts, Plaintiffs agreed to produce  
18 documents related to individuals who submitted declarations in support of their Motion  
19 for Class Certification. Dkt. 139-1. On June 10, more than two weeks after filing the  
20 Motion, Plaintiffs produced a handful of documents relating to some (but not all) of  
21 their declarants, as well as a privilege log evincing that they are improperly  
22 withholding 441 other responsive documents.

23 Plaintiffs' privilege log shows that the vast majority of the withheld documents  
24 have no indicia of work product—in other words, they were not prepared in  
25 anticipation of litigation, and they were not prepared by a party or party representative.  
26 As explained below, Plaintiffs have not produced any documents indicating that any of  
27 the putative class members have retained their counsel, and Sunrise is conservatively  
28 seeking *only* those documents that are clearly not attorney work product.

1 Plaintiffs' burden objection also falls flat. They have conceded that the  
2 documents are organized, compiled, and ready to be produced, but have not identified  
3 any burden they will endure if ordered to produce them, because they cannot.  
4 Plaintiffs are also incorrect that they are not obligated to produce certain documents  
5 because Sunrise *might* already have copies in its possession. No showing has been  
6 made that Sunrise actually has those same documents in its possession. And making  
7 matters worse, Plaintiffs have cherry-picked some of these documents to produce—  
8 namely, certain documents provided to them by individuals who submitted  
9 declarations in support of their motion for class certification—but withheld the others.  
10 That is not how discovery works. Plaintiffs are not entitled to conceal documents that  
11 they believe are inconsistent with their arguments and theories. Plaintiffs must  
12 produce all relevant non-privileged documents, whether they like the substance of  
13 those documents or not.

14 Sunrise propounded discovery requesting these documents in April 2019 and  
15 February 2020 because they are relevant to Plaintiffs' class certification motion (which  
16 Plaintiffs do not dispute), as well as to the merits of Plaintiffs' claims and Sunrise's  
17 defenses. For example, these documents may show a variety of expectations and  
18 experiences across the putative class, thereby confirming that Plaintiffs' claims are not  
19 susceptible to common proof on a class-wide basis. Indeed, they may also show any  
20 number of putative class members informing Plaintiffs' counsel that they *disagree* with  
21 Plaintiffs' theory in this case.

22 The documents are critical for the additional reason that Plaintiffs' counsel has  
23 demonstrated a failure to provide adequate or accurate information to putative class  
24 members. For example, after obtaining contact information via a *Belaire-West* notice  
25 process, Plaintiffs' counsel sent misleading communications to putative class  
26 members, which they subsequently corrected only after Sunrise demanded that they do  
27 so. *See* Allyn Decl., Exs. J, L. And the deposition of one of the named plaintiffs  
28 revealed that *she did not even know* she was a plaintiff in a lawsuit because *no one*

1 *ever told her.* See generally *id.*, Ex. M.<sup>1</sup> Sunrise has a serious concern that the  
2 documents Plaintiffs are currently withholding will reveal more misleading  
3 communications by Plaintiffs' counsel in an effort to advance this litigation, or  
4 additional examples of Plaintiffs' counsel hiding the ball from the people they seek to  
5 represent. If that is the case, Sunrise has a right to bring those troubling issues to light.

6 This misconduct is also part of a broader pattern by Plaintiffs of improperly  
7 withholding information, greatly prejudicing Sunrise's ability to prepare its opposition  
8 to Plaintiffs' class certification motion. Among many examples, with respect to the  
9 Requests for Production at issue here, Plaintiffs:

- 10 • Failed to appear for a scheduled meet-and-confer call regarding Sunrise's  
11 requests on April 24, 2020;
- 12 • Refused to discuss the requested documents on a May 5, 2020 meet-and-  
13 confer call that was specifically scheduled because Plaintiffs indicated that  
14 they would be available to discuss these issues at that time; and
- 15 • Failed to provide any substantive updates regarding these and other issues on  
16 a May 11, 2020 meet-and-confer call, despite having had months to prepare.

17 *Id.*, Ex. F. These tactics have hamstrung Sunrise's ability to prepare to depose  
18 Plaintiffs' declarants, oppose Plaintiffs' class certification bid, and otherwise prepare  
19 its defense in this case.

20 Because Plaintiffs' basis for withholding the admittedly relevant and responsive  
21 documents is unfounded, Sunrise respectfully requests that this Court compel  
22 production of all documents provided to Plaintiffs' counsel by, and all non-privileged  
23 communications with, all putative class members.

#### 24 **B. Plaintiffs' Introduction**

25 With this motion, Sunrise seeks to compel production of all "communications"  
26 between Plaintiffs' counsel and putative class members, including any documents  
27 those putative class members provided at the request of Plaintiffs' counsel. On June  
28 10, 2020, Plaintiffs produced all non-protected documents received from putative

---

<sup>1</sup> Plaintiffs subsequently submitted a sham declaration that directly contradicts Ms. Ganz's original deposition testimony. See Dkt. 144.



1 class members who provided declarations in support of Plaintiffs' motion for class  
2 certification. Plaintiffs also provided a privilege log for documents withheld as  
3 attorney work product, which includes: (i) Plaintiffs' counsel communications  
4 regarding drafts of the declarations that ultimately were submitted in final form; and  
5 (ii) Plaintiffs counsel's communications with putative class members who did not  
6 submit a declaration and documents received from those persons.

7 The withheld documents are protected from disclosure under the attorney work-  
8 product doctrine. *See e.g., Sinohui v. CEC Entertainment, Inc.*, Case No. EDCV 14-  
9 2516-JLS (KKx), 2016 WL 2743458, at \*7 (C.D. Cal. May 11, 2016) ("To the extent  
10 Plaintiff's counsel contacted the putative class member first as a potential witness,  
11 such information is protected by the attorney work-product doctrine;" as defendant can  
12 likewise contact putative class members, it "has not met its burden of establishing a  
13 substantial need for the information from Plaintiff's counsel sufficient to overcome the  
14 attorney work product protection.").

15 Here, Sunrise does not even cite, let alone attempt to meet, its burden to show  
16 both a "substantial need" for the materials and that it cannot obtain their substantial  
17 equivalent by other means without undue hardship. Fed. R. Civ. Pro. 26(b)(3)(B)(ii).  
18 Sunrise weakly asserts the documents are "critical" to its case defense, but ignores the  
19 fact that most of the documents (produced as to the declarant class members) consist of  
20 materials already in Sunrise's possession, such as admission agreements and billing  
21 records. *See* Declaration of Brian Umpierre ("Umpierre Decl."), ¶ 13.

22 Where, as here, putative class members communicated with Plaintiffs' counsel in  
23 order to express their interest in participating in this case – including by discussing  
24 their experiences with Sunrise – and Plaintiffs' counsel has acted with circumspection  
25 and care to keep that information confidential, work product protection applies. *Briggs*  
26 *v. OS Rest. Servs.*, Case No. 2:18-cv-8457 JAK (AFMx), 2019 WL 7195620, at \*3  
27 (C.D. Cal. Sept. 10, 2019) is clear on this point, Sunrise's interpretation  
28 notwithstanding. Nor have Plaintiffs' waived that protection simply by offering

1 declarations from some of those putative class members to support their class  
2 certification motion. The substance of the class member declarations do not reveal  
3 otherwise privileged communications with Plaintiffs' counsel. *Compare Briggs*, at \*4;  
4 *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 306 F.R.D. 234, 242 (N.D. Cal. 2015).

5 Lacking a real argument, Sunrise resorts to baseless accusations against  
6 Plaintiffs' counsel of "misconduct" and engaging in a "pattern" of "improperly  
7 withholding information." The record confirms that these accusations are false.  
8 Umpierre Decl., ¶¶ 20-27.

9 The irony of Sunrise's ad hominem attack is that, when the shoe was on the  
10 other foot, Sunrise flatly refused to produce *any* documents in response to Plaintiffs'  
11 document requests. Specifically, in March 2019, Plaintiffs asked Sunrise to produce  
12 communications between itself and others (necessarily including putative class  
13 members) regarding the allegations and claims asserted in this lawsuit. Plaintiffs also  
14 requested documents related Sunrise's attempts to obtain releases or waivers of the  
15 claims asserted in this lawsuit. Sunrise objected on work product and other grounds  
16 and refused to produce any responsive documents. Umpierre Decl., ¶¶ 28-29, Ex. N.

17 For these and the reasons detailed below, Sunrise's motion should be denied in  
18 its entirety.

19 **II. DEFENDANT'S MOTION TO COMPEL PRODUCTION OF**  
20 **DOCUMENTS**

21 Pursuant to Local Rule 37-1, the parties have met and conferred extensively  
22 regarding the Requests for Production at issue here, including via Sunrise's April 27,  
23 2020 letter, Plaintiffs' May 11, 2020 letter in response, a meet-and-confer telephone  
24 call on May 11, 2020, Sunrise's May 15, 2020 letter, a meet-and-confer telephone call  
25 on May 23, 2020, and Sunrise's June 9, 2020 letter. *See* Allyn Decl. ¶¶ 5-8, Exs. D-G.  
26 The parties have been unable to reach an agreement.

27 Sunrise served Plaintiffs with Requests for Production Nos. 5 and 15 on April  
28 29, 2019, and Request for Production No. 20 on February 14, 2020. *Id.* ¶¶ 2-3.

1 Plaintiffs served responses on May 29, 2019 and March 16, 2020, respectively. *Id.*  
2 The Requests and responses, in full, read as follows:

3 Sunrise's Request for Production No. 5

4 ALL DOCUMENTS and COMMUNICATIONS RELATING TO claims,  
5 allegations, complaints and/or lawsuits by YOU in which YOU represented or sought  
6 to represent a class or classes of plaintiffs.

7 Plaintiffs' Response to Request for Production No. 5

8 Objection. Plaintiff objects that this request is over broad and seeks information  
9 that is not relevant to the subject matter of this litigation and, as drafted, protected from  
10 disclosure by the attorney-client privilege and/or work-product doctrine. Discovery is  
11 ongoing and Plaintiff reserves the right to amend this response.

12 Subject to and without waiver of the foregoing objections, Plaintiff responds as  
13 follows:

14 After a reasonable and diligent search, there are no responsive documents  
15 beyond those related to the instant litigation.<sup>2</sup>

16 Sunrise's Request for Production No. 15

17 ALL DOCUMENTS and COMMUNICATIONS RELATING TO any allegation  
18 made in YOUR COMPLAINT, including DOCUMENTS and COMMUNICATIONS  
19 YOU contend support such allegations.

20 Plaintiffs' Response to Request for Production No. 15

21 Objection. The request is overbroad and oppressive. Plaintiff objects to the  
22 extent this request seeks information protected by the attorney-client privilege and/or  
23 work-product doctrine. Plaintiff objects further that the request seeks information that  
24 is already in Defendant's possession or otherwise available to Defendant and,  
25 therefore, may be accessible and obtained by Defendant with less burden than Plaintiff

26 \_\_\_\_\_  
27 <sup>2</sup> The quoted responses are those served by Plaintiffs Helen and Elise Ganz. Allyn  
28 Decl., Ex. B. Plaintiff Amy Fearn's response to Request for Production No. 5  
differs only in that the last sentence states "After a reasonable and diligent search,  
there are no responsive documents." *See id.*, Ex. A.

1 can identify and provide the requested information. Plaintiff objects the term  
2 “RELATING TO” is vague and ambiguous. Discovery is ongoing and Plaintiff  
3 reserves the right to amend this response.

4 Subject to and without waiver of the foregoing objections, Plaintiff responds as  
5 follows:

6 After a reasonable and diligent search, Plaintiff will produce the non-privileged  
7 documents responsive to this request that are found to exist within her possession,  
8 custody, or control, including PG000001 – PG000031 and PG000219 – PG000220  
9 (Residency Agreement); PG000032 – PG000151 (Resident Binder); PG000152 –  
10 PG000168 (Resident Handbook); PG000169 – PG000193 (Service Plan instructions);  
11 PG000194 – PG000217 (Resident Assessment); PG000218 (Rate Sheet); PG000221  
12 (Founder’s Letter); PG000250 – PG000251 (Ganz email correspondence); P000001 –  
13 P000012 (Glassdoor reviews); P000013 – P000018 (Yelp reviews); P000019 –  
14 P000082 (Sunrise website and brochure).<sup>3</sup>

15 Sunrise’s Request for Production No. 20

16 All DOCUMENTS produced to YOU in response to any THIRD-PARTY  
17 subpoenas, public records requests, or informal requests made to any THIRD-PARTY  
18 in connection with this ACTION.

19 Plaintiffs’ Response to Request for Production No. 20

20 Objection. Plaintiff objects to the extent that this request seeks information  
21 protected by the attorney-work product doctrine. Plaintiff also objects that the phrase  
22 “informal requests” is vague and ambiguous. Plaintiff objects further that the request  
23 seeks information that is already in Sunrise’s possession or otherwise available to  
24

---

25  
26 <sup>3</sup> The quoted responses are those served by Plaintiffs Helen and Elise Ganz. Allyn  
27 Decl., Ex. B. Plaintiff Amy Fearn was served with the equivalent request as  
28 Request for Production No. 17. Plaintiff Amy Fearn’s response to Request for  
Production No. 17 differs only in that the last paragraph states “After a reasonable  
and diligent search, Plaintiff will produce the non-privileged documents responsive  
to this request that are found to exist within her possession, custody, or control,  
including PF004146, PF004256, and PF004280.” *See id.*, Ex. A.

1 Sunrise and, therefore, may be accessible and obtained by Sunrise with less burden that  
2 Plaintiff can identify and provide the requested information. Discovery is ongoing and  
3 Plaintiff reserves the right to supplement or amend this response.

4 Subject to and without waiver of the foregoing objections, Plaintiff responds as  
5 follows:

6 After a reasonable and diligent search, Plaintiff will produce non-privileged  
7 documents within her possession, custody, or control that are responsive to this  
8 request, including documents obtained pursuant to a public records request regarding  
9 Sunrise of Beverly Hills (P000083 – P001743), Sunrise of Westlake Village (P001744  
10 – P003839), Sunrise of San Mateo (P003840 – P004345), and Sunrise of San Rafael  
11 (P004346 – P005329). As Sunrise is aware, Plaintiffs issued Rule 45 subpoenas for  
12 documents to twelve regional offices of the Department of Social Services –  
13 Community Care Licensing Division (“DSS-CCL”). Per the parties’ agreement  
14 reflected in the letter dated September 20, 2019, Sunrise’s counsel is permitted to  
15 conduct a preliminary review of the documents produced by DSS-CCL for privilege  
16 and/or confidentiality, after which counsel will produce, on a rolling basis, such  
17 documents to Plaintiffs’ counsel. As these documents are, therefore, equally available  
18 to Sunrise, Plaintiffs will not re-produce same back to Sunrise.<sup>4</sup>

19 **A. Sunrise’s Argument**

20 Plaintiffs are improperly withholding two categories of documents. The first is  
21 documents that putative class members provided *to* counsel: (i) email correspondence  
22 between putative class members and Sunrise employees; (ii) Sunrise “billing  
23 documents”; (iii) Sunrise residency agreements; and (iv) other, unnamed documents.  
24 The second category is Plaintiffs’ counsel’s *own* correspondence with putative class  
25 members.

26  
27  
28 <sup>4</sup> The quoted responses are those served by Plaintiffs Helen and Elise Ganz. Allyn  
Decl., Ex. C. Plaintiff Amy Fearn was not served with this Request for Production.

1 Plaintiffs concede that these documents exist, that they are relevant and  
2 responsive, and that they are organized in their counsel's files, ready to be produced.  
3 On June 10, 2020, following months of requests by Sunrise, Plaintiffs produced a  
4 handful of documents that were provided to them by some (but not all) of the 30  
5 declarants who submitted declarations in support of their motion for class certification.  
6 Allyn Decl. ¶ 9. They are refusing to provide those same documents for any other  
7 putative class members. Instead, they produced a lengthy privilege log indicating they  
8 are withholding at total of 449 documents—62 related to their class certification  
9 declarants and 387 related to other putative class members—on the basis that they are  
10 attorney work product because they are related to Plaintiffs' counsel's investigation in  
11 the course of this litigation. *See id.*, Exs. G-H. Only 8 (1.8%) of those documents are  
12 described as counsel's notes. *See generally id.*, Ex. H. Plaintiffs do not argue that any  
13 of these documents are protected by the attorney-client privilege, or that Plaintiffs'  
14 counsel represents any of the individuals with whom they have corresponded.

15 Because these documents are relevant, responsive, and critical to Sunrise's  
16 defense, and because neither of Plaintiffs' objections holds water, this Court should  
17 compel Plaintiffs to produce them.

18 **1. The Documents Are Indisputably Relevant and Critical to**  
19 **Sunrise's Defense**

20 As Plaintiffs concede, the documents and communications they are withholding  
21 are both relevant and responsive to Sunrise's requests at issue here. *See* Allyn Decl.,  
22 Ex. G. Plaintiffs recently filed their motion for class certification in which they  
23 contend their claims can be proven via common evidence on a class-wide basis. Dkt.  
24 147-1. Plaintiffs proffered evidence from putative class members in the form of  
25 declarations in support of that claim. *See* Dkt. 143. But that evidence is most certainly  
26 only part of the picture. The other documents that Plaintiffs' counsel collected from  
27 putative class members and chose to withhold may undermine Plaintiffs' arguments or  
28

1 show variation across the putative class. Plaintiffs concede their relevance and have  
2 no basis on which to withhold them.

3 The requested communications are especially crucial for the additional reason  
4 that, as both parties concede, Plaintiffs have sent misleading communications to  
5 putative class members in the past. *See Allyn Decl.* ¶¶ 11-13, Exs. J-L. Specifically,  
6 after Plaintiffs' counsel used a *Belaire-West* notice to obtain contact information for  
7 approximately 2,600 putative class members, they sent emails to those putative class  
8 members implying that Sunrise had **voluntarily** produced their contact information  
9 without regard for their privacy. This was misleading because Sunrise was **required** to  
10 produce information for anyone who did not return the *Belaire-West* opt-out form. *See*  
11 *id.*, Ex. L. This behavior is indicative of a pattern on the part of Plaintiffs' counsel,  
12 whose own client testified that she did not review the complaint in this action before it  
13 was filed, nor was she even aware that she had filed a lawsuit. *See id.*, Ex. M. Any  
14 misleading interactions between counsel and putative class members will bear directly  
15 on the adequacy of counsel and may also shed light on information set forth in the filed  
16 declarations.

17 Despite conceding both the relevance and responsiveness of non-privileged  
18 communications with putative class members, Plaintiffs' counsel refuses to produce  
19 them on the grounds that they are protected by the attorney work product doctrine and  
20 that their production would be unduly burdensome. Both of these excuses fall flat.

## 21 **2. Third-Party Documents and Communications Are Not** 22 **Protected Work Product**

23 Plaintiffs are improperly withholding 441 third-party documents based on the  
24 claim that they are protected by the attorney work product doctrine.<sup>5</sup> Plaintiffs claim  
25 this protection applies because the documents are related to their counsel's  
26

---

27 <sup>5</sup> According to Plaintiffs' privilege log, they are withholding 449 documents. Only 8  
28 of those documents are described as containing "[c]ounsel's notes." *See Allyn*  
*Decl.* ¶ 10, Ex. I. Sunrise does not seek to compel production of those 8  
documents.



1 investigation regarding the claims in this lawsuit. This is not a proper basis for  
2 withholding these documents. Documents qualify for work-product protection only if  
3 they (1) were “prepared *in anticipation of litigation* or for trial,” and (2) were prepared  
4 *by a party or that party’s representative*. *In re Cal. Pub. Utils. Comm’n*, 892 F.2d  
5 778, 780-81 (9th Cir. 1989) (citing Fed. R. Civ. P. 26(b)(3)) (emphases added).

6 Case law is clear that where, as here, a party’s counsel communicates with  
7 putative class members and other third parties, *the communications are discoverable*.  
8 *See Briggs v. OS Rest. Servs., LLC*, 2019 WL 7195620, at \*3 (C.D. Cal. Sept. 10,  
9 2019) (“communications of Plaintiff and his counsel” with “putative class members”  
10 “are not protected by the work-product doctrine”); *see also Apple, Inc. v. Samsung*  
11 *Elect. Co., Ltd.*, 306 F.R.D. 234, 242 (N.D. Cal. 2015) (party may not make a  
12 disclosure of communications to help his case then block discovery into related  
13 communications by asserting privilege or work product); *EEOC v. ABM Indus. Inc.*,  
14 261 F.R.D. 503, 511-513 (E.D. Cal. 2009) (communications between counsel and a  
15 general group of putative class members waives work product protection); *Brown v.*  
16 *Tax Ease Lien Serv., LLC*, 2017 WL 6939338, at \*17 (W.D. Ky. Sept. 20, 2019)  
17 (“Defendants likewise may have discovery of the solicitation of representation letters  
18 sent to potential class members and factual communications with potential class  
19 members by Plaintiffs’ counsel. Such letters are relevant not only to the Rule 23(g)  
20 considerations . . . , but also potentially bear on the credibility of the class members.”).

21 This is because putative class members are not parties to the litigation. To the  
22 extent that Plaintiffs are attempting to argue that the *content* of their counsel’s  
23 communications with putative class members could be considered to have been created  
24 in anticipation of litigation, these communications were not prepared by a party or  
25 their representative and thus cannot qualify as work product. *See In re Cal. Pub. Utils.*  
26 *Comm’n*, 892 F.2d at 781 (explaining work product protection can only be asserted by  
27 “one who is a party (or a party’s representative) to the litigation in which discovery is  
28 sought”); *see also* C. Wright & A. Miller, Fed. Practice & Proc. § 2024, at 201-02



1 (“[D]ocuments prepared for one who is not a party to the present suit are wholly  
2 unprotected.”); *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 247 (C.D. Cal. 1993) (noting  
3 “the fact that [individual asserting work product], a non-party to the present litigation,  
4 anticipated being named in the litigation affords him no protection under 26(b)(3)”).  
5 Plaintiffs have neither produced nor logged retention agreements for the declarants and  
6 putative class members over whose documents they now claim work-product  
7 protection, rendering them plainly discoverable. *See, e.g., EEOC v. CRST Van*  
8 *Expedited, Inc.*, 2009 WL 136025, at \*4 (N.D. Iowa Jan. 20, 2009) (“solicitation letters  
9 sent ... to prospective class members or oral representations made to prospective class  
10 members, prior to the establishment of an attorney-client relationship, are discoverable  
11 pursuant to Federal Rule of Civil Procedure 26(b)(3)(A)”); *see also Fangman v.*  
12 *Genuine Title, LLC*, 2016 WL 3362538, at \*3 (D. Md. June 17, 2016) (ordering  
13 production of “solicitation materials sent . . . to potential Plaintiffs or class members”  
14 noting they “are not privileged” and plaintiffs “failed to cite a single case holding that  
15 solicitation materials are shielded from discovery by the work-product doctrine”);  
16 *Brown*, 2017 WL 6939338, at \*17 (same).

17 Even if the communications themselves could plausibly be considered attorney  
18 work product (they cannot), the underlying documents that putative class members  
19 gave to Plaintiffs’ counsel are not protected from disclosure. *See Cal. v. Kinder*  
20 *Morgan Energy Partners, L.P.*, 2009 WL 10668706, at \*2 (S.D. Cal. Sept. 28, 2009)  
21 (“not all written materials obtained or prepared by an adversary’s counsel with an eye  
22 toward litigation are necessarily free from discovery”); *id.* (citing *Hickman v. Taylor*,  
23 329 U.S. 495, 510-11 (1946)) (“where relevant and non-privileged facts remain hidden  
24 in an attorney’s file and where production of those facts is essential to the preparation  
25 of one’s case, discovery may properly be had”).

26 As a result, Plaintiffs’ work product objections are improper, and the documents  
27 should be produced.

1                   **3. Plaintiffs’ “Burden” Objection Is Meritless**

2           During the parties’ May 11, 2020 meet-and-confer call, Plaintiffs stated that  
3 they objected to producing the requested documents because doing so would be  
4 “burdensome,” in part because many of the documents were authored by Sunrise (such  
5 as Sunrise billing statements or other documents related to resident care) or already in  
6 Sunrise’s possession (such as email communications between residents’ family  
7 members and Sunrise personnel). Plaintiffs have provided no factual or legal basis for  
8 their position that producing these documents is burdensome—because they cannot.  
9 *See Bible v. Rio Properties, Inc.*, 246 F.R.D. 614, 618 (C.D. Cal. 2007) (“[T]he party  
10 who resists discovery has the burden to show discovery should not be allowed, and has  
11 the burden of clarifying, explaining, and supporting its objections.”).

12           By Plaintiffs’ own admission, and as evidenced by the privilege log, the  
13 documents are already in counsel’s possession and organized by declarant or putative  
14 class member. *See Allyn Decl.*, Exs. G, H. As such, any purported “burden” is limited  
15 to simply producing 441 documents, a number that pales in comparison to the  
16 ***hundreds of thousands*** of pages produced by Sunrise to date.

17           To the extent Plaintiffs contend production of these documents would be  
18 burdensome because Sunrise has copies of those documents in its possession, this  
19 argument also fails. Sunrise cannot possibly have a majority of the documents, such as  
20 email correspondence, voicemails, and text messages between residents and resident  
21 representatives and Plaintiffs’ counsel. Sunrise is not required to guess at what  
22 documents may or may not have been provided to Plaintiffs, even if some of those  
23 documents were originally communications between putative class members and  
24 Sunrise personnel. Sunrise does not know what documents Plaintiffs are withholding  
25 because Plaintiffs redacted the names of the putative class members to which these  
26 documents relate. *See Allyn Decl.*, Ex. H. Sunrise thus has no way to confirm  
27 whether it does in fact have even a portion of these documents. Sunrise cannot be  
28 expected to guess .

1 In any event, this argument is simply not a proper basis for withholding  
2 documents. “[T]he requesting party’s alleged possession of the documents is not a  
3 legitimate basis for refusing to produce the documents.” *Balfour Beatty Infrastructure,*  
4 *Inc. v. PB&A, Inc.*, 2016 WL 7743032, at \*3 (M.D. Fla. Nov. 30, 2016); *see also*  
5 *Bretana v. Int’l Collection Corp.*, 2008 WL 4334710, at \*4 (N.D. Cal. Sept. 22, 2008)  
6 (“A requested party may not refuse to respond to a requesting party’s discovery request  
7 on the ground that the requested information is in the possession of the requesting  
8 party.”). This is particularly true where, as here, the objecting party has already  
9 gathered and organized the documents and has not articulated a specific burden  
10 involved in producing them.

11 Accordingly, this Court should grant Sunrise’s motion and compel Plaintiffs to  
12 produce all non-privileged documents produced to Plaintiffs’ counsel by, and all  
13 written or otherwise recorded communications with, Plaintiffs’ class certification  
14 declarants and any other putative class members.

15 **B. Plaintiffs’ Argument**

16 Sunrise’s instant motion seeks to piggy-back on opposing counsels’ industry and  
17 efforts to develop the claims advanced in this case. Plaintiffs’ counsel are entitled to a  
18 certain degree of privacy in preparing this case for trial. The content of counsels’  
19 communications with putative class members about their experiences with Sunrise –  
20 and the documents that putative class members provided in connection with those  
21 inquiries – reflect counsels’ strategy to obtain class certification and their evaluation of  
22 the strengths or weaknesses of the evidence required for trial. Where, as here, the  
23 information Sunrise seeks is equally available to Sunrise through its own industry,  
24 compelling Plaintiffs to hand over the fruits of their investigation is wholly at odds  
25 with the protections afforded by the work-product rule.

1                   **1. The Documents Sunrise Seeks Are Protected Work-Product**

2                   Fed. R. Civ. Pro. 26(b)(3) codifies the attorney work-product rule:

3                   a party may not discover documents ... prepared in anticipation of  
4                   litigation or for trial ... [unless the party seeking discovery] shows that is  
5                   has substantial need for the materials ... and cannot, without undue  
6                   hardship, obtain their substantial equivalent by other means.

6                   *Id.*<sup>6</sup>

7                   Here, Plaintiffs' counsel conducted a typical pre-trial investigation to evaluate  
8                   the strengths and weaknesses of their case. Upon receiving contact information for  
9                   putative class members' compiled by Sunrise and provided through the *BelAire-West*  
10                  notice process, Plaintiffs' counsel used that information to invite putative class  
11                  members to share their experiences about Sunrise. Plaintiffs produced the form letter  
12                  and three versions of the email they sent to putative class members, in response to  
13                  Sunrise's document requests. *See* Umpierre Decl., ¶ 3, 5, 7-9, 18; Exs. A, C, E, F  
14                  (P011563-P011568). A subset of those putative class members (or their representative)  
15                  responded to Plaintiffs' counsels' inquiries. Plaintiffs' counsel communicated further  
16                  with that subset of putative class members to gather information relevant to their class  
17                  certification motion and in anticipation of trial. Those communications reflect  
18                  counsels' strategy to obtain class certification, their evaluation of the strengths or  
19

---

20                  <sup>6</sup> Sunrise's motion is addressed to work product under the federal standard as  
21                  reflected in Fed. R. Civ. P. 23 and Plaintiffs respond herein accordingly. However,  
22                  as Plaintiffs' claims are before the Court on the basis of CAFA diversity  
23                  jurisdiction, California privilege law applies under Fed. R. Evid. 501. *See Hawkins*  
24                  *v. Kroger Co.*, Case No. 3:15-cv-02320-JM-AHG, 2020 WL 1952832, at \*17 (S.D.  
25                  Cal. Apr. 23, 2020). California codified the attorney work product privilege in the  
26                  Discovery Act. CCP §§ 2018.018 -2018.080. Absolute protection is given to "[a]ny  
27                  writing that reflects an attorney's impressions, conclusions, opinions, or legal  
28                  research or theories." *Id.*, § 2018.030(a); *Coito v. Super. Ct.*, 54 Cal.4<sup>th</sup> 480, 486  
(2012). Conditional protection is provided to any other work product which is  
discoverable if "the court determines that denial of discovery will unfairly prejudice  
the party seeking discovery in preparing that party's claim or defense or will result  
in an injustice." *Id.*, § 2018.030(b). At all events, should the subject discovery be  
protected under the Federal authorities, it surely is protected under the more  
expansive California rule. *See, e.g., Rumac v. Bottomley*, 143 Cal.App.3d 810, 815  
(1983) (work product protection for any document prepared by attorney in  
connection with work as attorney and regardless of whether litigation  
contemplated).

1 weaknesses of the evidence garnered to date, and the facts counsel found critical in that  
2 regard.

3 This information is protected from disclosure by the attorney work-product  
4 doctrine. *Sinohui v. CEC Entertainment, Inc.*, 2016 WL 2743458, at \*7 (“To the  
5 extent Plaintiff’s counsel contacted the putative class member first as a potential  
6 witness, such information is protected by the attorney work-product doctrine;” since  
7 defendant can likewise contact putative class members, it “has not met its burden of  
8 establishing a substantial need for the information from Plaintiff’s counsel sufficient to  
9 overcome the attorney work product protection.”); *see also*, *Campbell v. Best Buy*  
10 *Stores, L.P.*, Case No. LA CV 12-07794 JAK (SHx), 2013 WL 5302217, at \*16 (C.D.  
11 Cal. Sept. 20, 2013) (“Rule 26 does not require that Plaintiff disclose specifically  
12 which individuals he plans to use in support of his position, nor does it require that  
13 Plaintiff turn over declarations obtained from putative class members. ... ”); *Intel*  
14 *Corp. v. Via Technologies*, 204 F.R.D. 450, 452 (N.D.Cal. 2001) (rejecting argument  
15 that party was required to disclose witness declaration under Rule 26 disclosure report;  
16 “the declaration at issue was clearly work product right up until the moment it was  
17 filed.”)

18 These decisions are grounded in the well-recognized purpose of the work  
19 product rule – to prevent exploitation of a party’s efforts in preparing their case. *See*,  
20 *e.g.*, *Holmgren v. State Farm Mut. Ins. Co.*, 976 F.2d 573, 576 (9th Cir 1992);  
21 *O’Connor v. Boeing N. American, Inc.*, 216 F.R.D. 640, 642 (C.D. Cal. 2003) (“One of  
22 the primary purposes of the work product doctrine is to prevent one party exploiting  
23 the other party’s efforts to prepare for litigation.”); *U.S. ex rel. Burroughs v. DeNardi*  
24 *Corp.*, 167 F.R.D. 680, 685 (S.D. Cal. 1996) (“One of the primary functions of the  
25 work-product doctrine is to prevent a current or potential adversary in litigation from  
26 gaining access to the fruits of counsel’s investigation and analytic effort, and strategies  
27 for developing and presenting the client’s case.”).

1 Were Plaintiffs' compelled to produce the communications and related  
2 documents provided to their counsel by putative class members, Sunrise would  
3 unfairly benefit from Plaintiffs' counsels' industry and efforts as reflected in their  
4 expenditure of time and effort to gather evidence relevant to Plaintiffs' claims. Where,  
5 as here, the putative class members consist of Sunrise's own current and former  
6 residents and/or their family members, opposing counsel is free to interview them on  
7 their own initiative to find out what information they have that is relevant to the  
8 litigation. As the Supreme Court in *Hickman v. Taylor* observed: "[A] common law  
9 trial is and always should be an adversary proceeding. Discovery was hardly intended  
10 to enable a learned profession to perform its function [with] wits borrowed from the  
11 adversary." *Id.*, 329 U.S. 495, 516 (1947) (conc. opn. of Jackson, J.).

12 **C. Sunrise's Cases Are Inapposite**

13 Implicitly acknowledging that it cannot meet the standard under Rule 23(b)(3) to  
14 obtain discovery of attorney work-product, Sunrise argues the requested documents do  
15 not constitute attorney-work product. But the cases Sunrise cites for this position are  
16 clearly distinguishable.

17 Selectively quoting from *Briggs v. OS Rest. Servs.*, 2019 WL 7195620, at \*3,  
18 Sunrise argues that all communications between Plaintiffs' counsel and putative class  
19 members are discoverable. But what the *Briggs* court actually held is that where  
20 "plaintiff's counsel communicated with putative class members without any agreement  
21 or indication that the recipients would keep the communications confidential, or that  
22 the individuals were interested in participating in the case," then the communications  
23 are not protected work product. *Id.* Here, in contrast, the putative class members with  
24 whom Plaintiffs' counsel communicated did so due to their interest in participating in  
25 the case and to share their experiences concerning Sunrise facilities. *See* Umpierre  
26 Decl, ¶¶ 10-13 (describing Plaintiffs' use of *BelAire-West* notice contact information to  
27 send communications to approximately 1,943 putative class members to invite them to  
28



1 contact Plaintiffs' counsel if they wished to share their experiences at Sunrise). Those  
2 communications have been maintained as confidential. Umpierre Decl., ¶¶ 14-18.

3 *Apple v. Samsung Elecs. Co., Ltd.*, 306 F.R.D. 234 (N.D. Cal. 2015), is likewise  
4 inapposite. There, the party asserting the claim of privilege (Samsung) "referenced  
5 privileged communications" to support arguments in opposing a sanctions motion.  
6 The court found Samsung's use of privileged information as both "sword and shield"  
7 constituted a waiver. *Id.* at 242-243. Here, Plaintiffs did not rely on privileged or  
8 protected information to advance their litigation position. Plaintiffs filed declarations  
9 from certain putative class members and produced the non-protected documents  
10 received from those declarants. There has been no "sword and shield" use of protected  
11 information. Nothing in *Apple* supports Sunrise's contention that the mere filing of  
12 declarations opens up discovery into Plaintiffs counsel's opinions and strategies  
13 reflected in communications with the declarants and drafts of their final declarations.  
14 Those materials remain protected as attorney work product. *See Intel Corp. v. VIA*  
15 *Tech.*, 204 F.R.D. at 452 (declaration is work product "right up until the moment it was  
16 filed").

17 Sunrise's reliance on *EEOC v. ABM Indus. Inc.*, 261 F.R.D. 503 (E.D. Cal.  
18 2009) is misplaced. There, defendant ABM sought discovery of a cover letter and  
19 questionnaire that the EEOC sent to approximately 4,000 current and former ABM  
20 janitorial employees. The court found that, by sending the communication to persons  
21 who may have separated on favorable terms and thus likely to make disclosure to  
22 ABM, with no request to maintain confidentiality, the EEOC waived any work product  
23 protection. *Id.* at 512 (EEOC failed to exercise the "requisite degree of circumspection  
24 and care the law requires").

25 Here, Plaintiffs have produced the initial introduction letters that Plaintiffs'  
26 counsel caused to be sent to putative class members. Umpierre Decl., Exs. A, C, E, F.  
27 Unlike the EEOC, there is no showing that Plaintiffs' counsel failed to exercise the  
28 "requisite degree of circumspection and care" to maintain confidentiality with respect

1 to withheld documentation. Sunrise’s argument that sending the initial form  
2 communication to class members somehow constitutes a future waiver of all work-  
3 product related to communications with the contacted persons borders on the absurd.

4 Equally specious is Sunrise’s argument that Plaintiffs’ counsels’ communications  
5 with putative class members cannot be attorney-work product because “these  
6 communications were not prepared by a party or their representative.” The  
7 communications originated with ***Plaintiffs’ representatives*** – their counsel – and were  
8 pursued in connection with their investigation into the merits of class certification and  
9 for trial. This is attorney work-product by definition. *See* Fed. R. Civ. Pro. 23(b)(3),  
10 CCP § 2018.030. This includes any documents putative class members provided to  
11 counsel, at their request, in that it reveals what counsel considered important with  
12 regard to class certification and the merits at trial. This information was withheld from  
13 production, after careful review, and detailed in the privilege log Plaintiffs provided on  
14 June 10, 2020. Umpierre Decl., ¶ 18.

15 Sunrise’s related contention that no work-product protection applies to  
16 communications that occurred after the litigation has commenced conflicts with the  
17 plain language of Rule 23(b)(3). *See id.* (“... prepared in anticipation of litigation **or**  
18 **for trial** ...”) (emphasis added). That is why, for example, work product protections  
19 have attached to declarations obtained, but not filed, at the class certification stage.  
20 *Campbell*, 2013 WL 5302217, at \*16; *Intel*, 204 F.R.D at 452; *see also Johnston v.*  
21 *Don Employees’ Pension Plan*, Case No. 14-cv-10427, 2016 WL 1106889, at \*5 (E.D.  
22 Mich. Mar. 22, 2016) (emails to putative class members were prepared after litigation  
23 had already begun “appear to meet the requirement that they be made in anticipation of  
24 litigation”). It also conflicts with California law. *See Rumac*, 143 Cal.App.3d at 815  
25 (California work product protection extends to documents prepared even in non-  
26 litigation context).



**D. Sunrise Cannot Meet Its Burden Under Rule 23(b)(3)**

Current and former residents of Sunrise’s residential care facilities are as available and accessible to it as they were to Plaintiffs – if not more so insofar as Sunrise provided the contact information for a portion of putative class members and has the names and last known contact information for the remainder of the putative class. Sunrise claims that documents from putative class members are “critical,” yet it has not even attempted to claim unfair prejudice or any injustice that would result from having to conduct its own pre-trial investigation of the claims and defenses at issue in this case. Sunrise’s ipse dixit notwithstanding, it cannot, therefore demonstrate substantial need of this information, or that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *See* Fed. R. Civ. Pro. 23(b)(3); *Sinohui*, 2016 WL 2743458, at \*16 (defendant could not meet its burden under Rule 23(b)(3) because “[t]here is nothing preventing Defendant from directly contacting the non-representative putative class members”).

By way of example, many of the documents Sunrise seeks are its own documents, relating to the business relationships between itself and its current and former residents. This information is presumably within Sunrise’s own files; it cannot, therefore, demonstrate it is unable to obtain this information without undue hardship. What is more, the categories of document provided, at Plaintiffs’ counsels’ request, reveals counsels’ mental impressions. To the extent Sunrise is seeking “email correspondence, voicemails, and text messages between residents and resident representatives and Plaintiffs’ counsel” that “may undermine Plaintiffs’ arguments or show variation across the putative class,” such information is obtainable by Sunrise through its own investigatory efforts. Sunrise should not be permitted to obtain at Plaintiffs’ and their counsels’ expense information it could not obtain directly from the putative class members who provided it. *See, e.g., Burgess v. Tesoro Refining and Marketing Co.*, Case No. CV 10-5870-VBF (PLAx), 2011 WL 13217362, at \*2 (C.D.

1 Cal. Jul. 5, 2011) (noting “heavy burden” to obtain discovery from absent class  
2 members).

3 **E. Sunrise’s Smear of Plaintiffs’ Counsel is Baseless, False, and**  
4 **Irrelevant**

5 Based purely on innuendo, Sunrise accuses Plaintiffs’ counsel of “misconduct”  
6 and “improperly withholding information.” Those charges are inflammatory and false.

7 First, Plaintiffs’ counsel did not send “misleading” communications to putative  
8 class members. After receiving contact information for approximately 15% of the  
9 putative class, Plaintiffs sent an email to 730 email addresses (about 60 of which  
10 bounced back as undeliverable), on January 27, 2020. *See* Umpierre Decl., ¶ 3. Upon  
11 receiving Sunrise’s complaint a few days later – in which Sunrise admitted Plaintiffs’  
12 communication was “not technically incorrect” – Plaintiffs’ counsel sent out a  
13 subsequent email modifying the language to comply with Sunrise’s request, and  
14 informed Sunrise of same. *Id.*, ¶¶ 4-6, Exs. B-D. In the following weeks, Plaintiffs  
15 transmitted the communication with Sunrise’s requested language to approximately an  
16 additional 1,213 putative class members. More specifically, on approximately  
17 February 3, 2020, Plaintiffs sent approximately 485 letters by regular mail, and an  
18 additional 728 emails on February 27, 2020. *See id.*, ¶¶ 8-9. Indeed, Plaintiffs did  
19 more than Sunrise asked by sending communications with Sunrise’s modified  
20 language to all 730 putative class members initially contacted rather than only those  
21 with whom Plaintiffs’ counsel were “engaged in ongoing communications.”

22 Second, Sunrise’s claim that Ms. Ganz submitted a sham declaration in support  
23 of the motion for class certification is baseless. As Ms. Ganz explained, she did not  
24 remember at her deposition when the first amended Complaint was filed and she  
25 trusted her attorneys to handle that filing. Declaration of Elise Ganz in Support of  
26 Plaintiffs’ Motion for Class Certification (Dkt. 144), ¶ 32. Ms. Ganz did “understand  
27 that she joined a lawsuit that was [already] on file as a plaintiff” and that she “was  
28 going be representative of a class action.” *Id.* Further, Ms. Ganz knew she reviewed a

1 copy of the Complaint before she was added as a named plaintiff when her lawyers  
2 discussed with her statements about her and her mother, Helen. *Id.* Ms. Ganz has no  
3 legal training and, not surprisingly, became confused under intense questioning that  
4 did not follow a chronological sequence of events. *See* Umpierre Decl., Ex. O (Ganz  
5 deposition excerpts at 176:16-180:20, describing initial communications with  
6 Plaintiffs’ counsel then jumping to lay witness’ knowledge of current, pre-certification  
7 status). Nevertheless, her testimony is ambiguous at worst. *See id.*<sup>7</sup> Without more,  
8 there is simply no need to impugn counsels’ – or Ms. Ganz’s – integrity. *See Yeager v.*  
9 *Bowlin*, 693 F.3d 1076, 1080-1081 (9th Cir. 2012) (explaining or clarifying prior  
10 testimony elicited by opposing counsel on deposition inconsistencies that result from a  
11 mistake should not lead to striking declaration on grounds it was a “sham”).

12 Third, Sunrise’s description of the parties’ meet and confer efforts on the subject  
13 discovery is one-sided and self-serving. First, Sunrise fails to mention that a condition  
14 for the April 24 meet and confer call was it provide, in advance of the call, specific  
15 dates to meet and confer with respect to outstanding issues related to Sunrise’s  
16 production of assessment and service plan data and other ESI – discovery itself  
17 outstanding for months by that time. *See* Umpierre Decl., ¶¶ 20, Ex. J. Sunrise  
18 responded, stating it would provide dates on which they would be available to meet  
19 and confer on the assessment/service plan data and other ESI issues the following day,  
20 April 24. *Id.*, ¶ 21 Ex. J. Sunrise failed to provide those dates – and for that reason –  
21 the April 24 meet and confer did not go forward. *Id.*, ¶ 22, Ex. K.

22 Sunrise’s descriptions of the May 5 and May 11 meet and confer calls again  
23 omit key facts. The agenda for the May 5 call included Sunrise’s production of  
24 assessment data and related ESI issues, among other things. *See* Umpierre Decl., ¶ 23,  
25

---

26 <sup>7</sup> Including testimony such as: Q: “Did you know this is not a class action, and it’s a  
27 case that you filed ...” A: “I did not know I was not part of a class action.” Q: “It’s  
28 a proposed class action.” A: “Oh.” ... Q: “Were you told [that] you would be added  
to this lawsuit before you were added to it?” A: “I don’t understand your question.”  
... A: “... thought I was part of a group of people that were going to be in this  
lawsuit.”

1 Ex. L. Plaintiffs informed Sunrise they would address their responses and objections to  
2 the subject document requests in writing. *See id.* After accommodating Sunrise's  
3 request to postpone the meet and confer discussion a couple of days, Plaintiffs' agreed  
4 to the call which ultimately occurred on May 5. Plaintiffs never agreed to include the  
5 subject discovery as an agenda item on that call and provided their written response to  
6 same on May 11. *Id.*, ¶¶ 24, 26 Exs. M, G. Indeed, Plaintiffs' accommodated Sunrise's  
7 demand for a meet and confer call later that same day; counsel provided whatever  
8 "update" it could to the letter sent only hours earlier. *See id.*, ¶¶ 26-27.

9 Undoubtedly, attempts to resolve the parties' discovery disputes have been, at  
10 times, contentious. However, Sunrise's baseless allegations of wrongdoing related to  
11 other discovery are irrelevant to the issues of whether the subject documents are work  
12 product and are insufficient to overcome its burden to show a substantial need and  
13 undue hardship. To be clear, however, Plaintiffs' counsel have at all times comported  
14 themselves with professionalism and courtesy. At all times, Plaintiffs' counsel have  
15 acted in good faith.

16  
17 Dated: July 9, 2020

18 JASON C. SCHWARTZ  
19 MICHELE L. MARYOTT  
20 ASHLEY ALLYN  
GIBSON, DUNN & CRUTCHER LLP

21 By: /s/ Michele L. Maryott  
22 Michele L. Maryott

23 Attorneys for Defendant  
24 SUNRISE SENIOR LIVING, LLC  
25  
26  
27  
28

1 Dated: July 9, 2020

2 KATHRYN A. STEBNER  
3 SARAH COLBY  
4 GEORGE N. KAWAMOTO  
5 BRIAN S. UMPIERRE  
6 STEBNER AND ASSOCIATES

7 CHRISTOPHER J. HEALEY  
8 DENTONS US LLP

9 GUY B. WALLACE  
10 TRAVIS C. CLOSE  
11 MARK T. JOHNSON  
12 SCHNEIDER WALLACE COTTRELL  
13 KONECKY WOTKYNs LLP

14 ROBERT S. ARNS  
15 THE ARNS LAW FIRM

16 MICHAEL D. THAMER  
17 LAW OFFICES OF MICHAEL D. THAMER

18 W. TIMOTHY NEEDHAM  
19 JANSSEN MALLOY LLP

20 By: /s/ Christopher J. Healey  
21 Christopher J. Healey

22 Attorneys for Plaintiff and the Proposed Class  
23  
24  
25  
26  
27  
28

**ATTESTATION PURSUANT TO L.R. 5-4.3.4**

I, Michele L. Maryott attest that all other signatories listed, and on whose behalf this stipulation is submitted, concur in the contents of the stipulation and have authorized this filing.

Dated: July 9, 2020

/s/ Michele L. Maryott  
Michele L. Maryott

103975957 1